

No. 16,110

United States Court of Appeals
For the Ninth Circuit

JERRY LEE BIRDSONG and DENNIS BIRDSONG, by and through their guardian ad litem, Ora Mae Birdsong, and ORA MAE BIRDSONG,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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FILED

NOV - 7 1958

PAUL P. O'BRIEN, CLERK

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BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The appellants' statement of the case as recited in their brief is essentially correct. However, the brevity of this statement does not present to the court the true history of the litigation prior to its being dismissed by Federal Judge Louis E. Goodman on April 23, 1958.

The appellants' action for wrongful death was instituted one day prior to the running of the Statute of Limitations. 28 U.S.C. 2401. The complaint (Tr. 5 through 8) discloses that the cause of action upon which appellants based their claim occurred on April

11, 1954. The action was commenced on April 10, 1956.

A review of the docket entries (Tr. 3, 4 and 5) discloses the appellants were unable to present to the court an amended complaint which could be properly answered until one year and eight days following the filing of the original complaint. This was accomplished in the form of a Second Amended Complaint. (Tr. 17-21.)

During the first year that this case was pending in the District Court two separate motions for a more definite statement were filed by the appellee and granted. The first motion for a more definite statement was granted on July 23, 1956. (Tr. 11-12.) No first amended complaint was filed until October 9, 1956, approximately three months following the granting of the motion for a more definite statement. (Tr. 12-15.) Rule 12(a)(2) of the Federal Rules of Civil Procedure requires that an amended pleading shall be filed within 10 days after granting a motion for a more definite statement. Following the filing of the first amended complaint, the appellee again filed a motion for a more definite statement which was granted on December 4, 1956. (Tr. 16-17.) Not until April 18, 1956, more than four months after the court, for a second time, granted appellee's motion for a more definite statement was a second amended complaint filed. (Tr. 17-20.)

Subsequent to the filing of the second amended complaint, the appellee filed its answer (Tr. 21-22) and on

May 17, 1956, propounded written interrogatories to the appellants. (Tr. 22-35.) The written interrogatories were not answered by the appellant until August 29, 1957, three months after they were served, this being contrary to Rule 33 of the Federal Rules of Civil Procedure which requires that responses be made within 15 days.

SPECIFICATIONS OF ERROR.

It is the position of the appellee that the United States District Court for the Northern District of California did not abuse its judicial discretion in dismissing appellants' complaint and cause of action for lack of prosecution.

ARGUMENT.

The only authority which appellants have cited in their brief is *Boling v. United States*, 231 F. 2d 926, a decision of this Appellate Court. The facts in the *Boling* case are almost identical to the instant appeal. The Federal Judge that dismissed the *Boling* case for lack of prosecution is the same Federal Judge that dismissed this case. At the very outset of the *Boling* case, this court stated:

“The power of the trial court to dismiss a cause where the matter has become stale by virtue of *inaction* by plaintiff is inherent and has been crystalized by rule. Rule 41(b), Federal Rules of Civil Procedure, 28 U.S.C.A. One of the causes of congestion of the trial dockets is the

failure of courts to exercise the authority vested in them thus to dispose of cases which are shaky or unfounded but which are held on the calendar for nuisance value. Since trial judges are hesitant to dismiss such causes of their own motion, for fear of injustice to some litigant, the device of placing cases in which no action has been taken for a considerable time on a docket for dismissal, absent a showing of adequate explanation for the delay, has been used. But even this palliative for the admitted evil has been of little avail, because of the innate hesitancy mentioned above. Because of this fact, an order of dismissal for failure to prosecute *will never* be set aside unless there has been an abuse of discretion, and, of course, such a situation is not presumed." (Emphasis added.)

The main complaint upon which the appellants rely for a reversal of the order of dismissal is their attorneys' statement that they did nothing toward further prosecution of the civil litigation pending word from appellee's counsel as to the availability of certain defense witnesses for deposition. (Brief, pages 3, 4 and 5.)

It is to be noted that this reliance by appellants' counsel as to the appellee's attorney securing witnesses for a deposition continued for approximately five months. Nothing was done by appellants during this period of time. This reason for delay was thoroughly discussed before Judge Goodman on the occasion of this case's appearance on the civil dismissal calendar. This explanation of inaction was called to the court's attention again on appellants' subsequent motion to

set aside the order for dismissal. (Tr. 51, 55, 56 and 57.) It is eminently clear from the transcript and the comments of the District Judge that all the problems presently before this court were duly and thoroughly considered by Judge Goodman prior to his dismissing this action. The record does not demonstrate the exercise of gross abuse of discretion by the trial court in dismissing this case that warrants a reversal by this court.

Hicks v. Bekins Moving & Storage Co., 115 F. 2d 406 (9th Cir. 1940);

Sweeney v. Anderson, 129 F. 2d 756 (10th Cir. 1942);

United States v. Pacific Fruit & Produce Co., 138 F. 2d 367 (9th Cir. 1943);

United States v. McWilliams, 163 F. 2d 695 (D. C. Cir. 1947).

In *Boudreau v. United States*, 250 F. 2d 209, this court recently affirmed its decisions in *Boling v. United States*, supra, and *Hicks v. Bekins Moving & Storage Co.*, supra. The court in the *Boudreau* case found that the trial court properly exercised its judicial discretion in dismissing a case for want of prosecution. The same situation exists here.

It is respectfully submitted that in view of the long history of delays on the part of appellants in failing to timely file amended complaints after motions for a more definite statement were granted and appellants' failure to timely answer the appellee's interrogatories clearly disclose that the appellants were not prompt and expeditious in disposing of their litigation from

the very moment of its inception. The mere fact that they were stirred into action after being notified of a pending dismissal is no excuse for their past dereliction and not a sufficient reason to persuade a trial court to refuse to exercise its judicial power in dismissing stale and long-standing cases. *Hicks v. Bekins Moving & Storage Co.*, supra.

CONCLUSION.

The dismissal of appellants' claim against appellee was justified and a proper exercise of an inherent judicial power. Arguments propounded by the appellants fail to disclose that the District Court abused its discretion in granting this dismissal. In the absence of any showing on the part of the appellants that there was abuse of discretion, a reversal cannot be effected by this court.

The appellee respectfully submits that the order of dismissal be affirmed.

Dated, San Francisco, California,
November 5, 1958.

Respectfully submitted,

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